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IN THE

Supreme Court of the United States

October Term, 1963
No. 645

Case No. 17235

PENSICK & GORDON, INC.,
Petitioner

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,
Respondents.

Case No. 17380

PENSICK & GORDON, INC., a California corporation,
Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*,
Respondents.

Brief of Respondents Pacific Intermountain Express, a Corporation, and Consolidated Freightways, a Corporation, in Reply to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

Introduction.

Petitioner, by the Petition for Certiorari herein, seeks review of the decision of the United States Court of Appeals for the Ninth Circuit, on remand, affirming the dismissal of consolidated cases Nos. 17235 and 17380 as to these respondents and other respondents similarly situated, for lack of jurisdiction. Other parties to

said consolidated appeals, as to whom the United States Court of Appeals for the Ninth Circuit reversed dismissals for lack of jurisdiction, have petitioned separately (Docket No. 625, October Term, 1963) for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review that Court's decision.

These Respondents concur in the view that a resolution of the questions presented by that petition is necessary. The questions raised and issues presented by the cross-petitions are so intertwined that it will be necessary to discuss herein both petitions.[1]

Opinions of the Supreme Court and of the Courts Below.

The petition correctly summarizes and appends these opinions except that the opinion of this Court in *Hewitt-Robins, Incorporated v. Eastern Freight-Ways, Inc.* 371 U. S. 84, 9 L. Ed. 2d 142, 83 S. Ct. 157 (1962), is improperly included under this heading. The opinion of the Court of Appeals on remand [Pet. App. D, pp. 19 *et seq.*] is reported at 323 F. 2d 769.

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[1]For purposes of clarity and brevity the following references will be used herein: Respondents Pacific Intermountain Express and Consolidated Freightways will sometimes be referred to as "P.I.E." and "C.F." respectively, and at other times collectively with other respondent parties to the instant petition as "Respondents." Petitioner herein and Respondent in the cross-petition referred to above will on occasion be designated as "Shipper." Petitioners in the cross-petition will be referred to collectively as "Other Carriers." Page references to the printed transcript in cases nos. 17235 and 17380 in the Court below will be preceded by the designation "1 Tr." and "2 Tr." respectively. Page references to the Shipper's petition will be preceded by the designation "Pet." Page references to the petition of the Other Carriers will be preceded by the designation "O.C. Pet." Page references to Shipper's reply to the petition of the other carriers will be preceded by the designation "Shipper's Rep."

Questions Presented.

The immediate question presented by the petition herein is as follows:

Notwithstanding the decision of this Court in *T.I.M.E. Inc. v. United States,* 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), does the District Court have jurisdiction over the subject matter of a shipper's post-shipment claim for damages against an interstate motor carrier arising out of the carrier's alleged unreasonable failure to render pickup and delivery service, where diversity of citizenship between shipper and carrier does not exist.

If the answer to this question were to be in the affirmative, then, of necessity, certain questions raised in the petition of the Other Carriers [O. C. Pet. pp. 3-4] are also presented. These are:

1. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of common carriers by motor vehicle in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part II?[2]

* * * * *

3. Assuming jurisdiction of the District Court over the action, may the District Court seek and the

---

[2] The second question presented in the Other Carriers' petition would not be relevant to Respondent's P.I.E. and C.F. since they are not freight forwarders. It reads as follows:

2. Does a post-shipment action for damages predicated upon a claim of a shipper that failure of freight forwarders in interstate commerce to render pickup and delivery service across picket lines at shipper's place of business constitutes unjust and unreasonable discrimination in service survive enactment of the Interstate Commerce Act, Part IV?

Interstate Commerce Commission give an advisory opinion as to whether the carrier's conduct in failing to provide pickup and delivery service across picket lines constitutes an unjust and unreasonable discrimination in service?

4. Is jurisdiction of the District Court in the particular controversy pre-empted by that of the National Labor Relations Board under the Labor Management Relations Act, 29 U. S. C. A. §§141 *et seq.*?

5. Assuming jurisdiction of the United States District Court is not so pre-empted, may the District Court seek and the National Labor Relations Board give an advisory opinion as to whether any activity of any person pertinent to the determination of the action is protected or prohibited by the National Labor Relations Act, as amended?

Shipper has conceded that questions 3 and 5 above require resolution and determination by this Court [Rep. pp. 5-6]. Shipper concedes that question 4, above, has not been directly decided by an opinion of this Court and that its determination is required before further proceedings can be had. Shipper further notes that the question is encompassed (though in a form begging it), in question 5 presented by Shipper [Rep. pp. 4-5]. Shipper contends in its reply to the petition of the other carriers, that question 1 does not require any further determination by this Court [Rep. pp. 4-5]. However, in its instant petition, Shipper argues persuasively, contrary to its prior contention, that such a determination is indeed necessary and thereby now concedes that this question also requires determination by this Court [Pet. pp. 13, 16-21].

Statutes Involved.

The petition presents questions of Congressional intent in the enactment of the Interstate Commerce Act, Part II §§201-227 [49 U. S. C. §§301-327] and the Labor Management Relations Act, §§141-187 [29 U. S. C. §§141-187]. Therefore, in some measure, all of each of the above-cited provisions has pertinence. For convenience of reference, these statutes will be referred to in subsequent parts of this brief as the "Motor Carrier Act," and the "Labor Relations Act," respectively. The provisions of these statutes most directly involved are Interstate Commerce Act, Part II, §§216(b), 216(d) and 216(j) [49 U. S. C. §§316(b), (d) and (j)], and Labor Management Relations Act, §§7 and 8 [29 U. S. C. §§157, 158]. The provisions of the Motor Carrier Act are quoted in the petition (Pet. pp. 6-7). Sections 7 and 8 of the Labor Relations Act are reproduced in Appendix A hereto.

Statement of the Case.

This is an action for damages by a shipper against motor carriers predicated upon a claim that the failure of such carriers to provide service in interstate commerce to and from the shipper's place of business constituted unjust and unreasonable discrimination in service. As to these Respondents, the action is brought on the original verified complaint [1 Tr. 4-28]. Initially, Petitioner sought injunctive relief as well but abandoned this position prior to the hearing upon Respondents' motions to dismiss. The material facts are disclosed by Petitioner's verified complaint and by affidavits properly before the district court submitted by Petitioner and various defendants in the action, including Respondents herein. Initially, Petitioner asserted juris-

diction in the United States District Court under 28 U. S. C. §1332 and 28 U. S. C. §1337[3], but now concedes that as to Respondents herein, including P.I.E. and C.F., diversity of citizenship could not be shown.

Shipper, a wholesale distributor of toys, sells its merchandise to retail stores throughout the Western United States and regularly and customarily calls upon common carriers, including P.I.E. and C.F., to deliver merchandise to it and to pick up merchandise consigned by it to its customers [1 Tr. 5, 6, 59-61; 2 Tr. 2d-e], Respondents P.I.E. and C.F. are common carriers of property by motor vehicle in interstate commerce operating under certificates of public convenience and necessity issued to them pursuant to the Motor Carrier Act [1 Tr. 5, 75, 83].

Commencing on October 12, 1960, and continuing thereafter on October 13, 14, 17 and 18, 1960, there was a strike of Shipper's employees and the Teamsters union maintained a picket line at petitioner's place of business [1 Tr. 40, 42, 174-175; see also 2 Tr. 80-81, 86]. Driver employees of P.I.E. and C.F. and of other common carriers who were members of the Teamsters union [1 Tr. 79, 89] refused to cross from the public streets through the Teamster picket line to accomplish pick-up or delivery of shipments at the loading platform on Shipper's premises. The only known instances where either P.I.E. or C.F. allegedly failed to serve Shipper occurred solely as a result of said refusal of drivers to cross the picket line, despite instruc-

[3] In its petition Shipper appears to be relying on 28 U. S. C. §1331 (Pet. p. 5); this basis for jurisdiction was not advanced either on the pleadings or in any of the prior proceedings in this Court of the Court of Appeals [*e.g.*, 1 Tr. 4; 2 Tr. 2a].

tions from said Respondents to do so [1 Tr. 42, 77, 80, 84-88].

The District Court dismissed the action [1 Tr. 94] upon motions by Respondents P.I.E. and C.F. and other common carrier defendants made on the ground that the District Court was without jurisdiction both under the Motor Carrier Act and the Labor Relations Act, and because of absence of diversity of citizenship [1 Tr. 43-45, 72-73]. Shipper appealed [1 Tr. 95] and filed its First Amended Complaint, alleging diversity of citizenship specifically as to the defendants named therein, and deleting Respondents herein, including P.I.E. and C.F., as to whom diversity of citizenship could not be shown [2 Tr. 2-2h]. The action was again dismissed by the District Court, upon motion of the Other Carriers made on the ground that the District Court was without jurisdiction under the Motor Carrier Act and the Labor Relations Act [2 Tr. 192, 55; 82]. Shipper appealed again [2 Tr. 194] and the two appeals were consolidated for consideration and decision.

In its first opinion the Court of Appeals held that the Motor Carrier Act did not create a statutory cause of action cognizable in the federal courts and that survival of a common-law action would be inconsistent with that Act's statutory purpose. The effect upon jurisdiction of the Labor Relations Act was not decided.

This Court granted certiorari and, in a *per curiam* opinion, remanded the case to the Court of Appeals for further consideration in light of the decision in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U. S. 84, 9 L. Ed. 2d 142, 83 S. Ct. 157 (1962).

In its opinion on remand, review of which is sought by the instant Petition and the Petition filed by the Other Carriers, the Court of Appeals affirmed the holding in its first opinion that the Motor Carrier Act creates no statutory cause of action cognizable in the federal courts, and further held: (1) that the complaint states a common law cause of action which survives passage of the Motor Carrier Act; (2) that jurisdiction of the District Court is not pre-empted by that of the National Labor Relations Board under the Labor Relations Act; (3) that the District Court can determine to what extent, if any, the common law has been affected or qualified by the Motor Carrier Act or the Labor Relations Act or both; and (4) that the District Court can refer or require reference to the Interstate Commerce Commission or the National Labor Relations Board for such aid as may be necessary or useful to the Court's ultimate decision.

ARGUMENT.

I.

No Basis Exists for Review of the Question Presented by the Instant Petition Because the Holding of the Court of Appeals That No Statutory Cause of Action Arose Under the Motor Carrier Act Is Correct and Consistent With Prior Decisions of This Court.

The court below refused to read *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U. S. 84; 9 L. Ed. 2d 142; 83 S. Ct. 157 (1962) as holding that the Motor Carrier Act created a statutory cause of action cognizable in the federal courts in the first instance, inasmuch as it considered only the survival of the common law right there involved and did not purport to change the prior holding of this court in *T.I.M.E., Inc. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959). Accordingly, it held that further proceedings in the District Court should be limited to Shipper and the other carriers as to whom diversity of citizenship exists. No diversity exists as to these respondents, who were party only to case No. 17235 in the court below [Pet. p. 8].

Referring to criteria enunciated in Rule 19, petitioner argues for the allowance of the writ, as follows:

(a) First, petitioner contends that the decision below contravenes the "teaching" of *Hewitt-Robins*, and conflicts with a decision of the Eighth Circuit and a decision in the Southern District of Indiana [Pet. p. 14]. In respect to the latter contention,[4] the lower court cases referred to, *Meier & Pohlman Furniture*

[4]The former contention will be considered in sub-point (b), *infra*.

Co. v. Gibbons, 233 F. 2d 296 (8th Cir. 1956), cert. den. 352 U. S. 879, 1 L. Ed. 2d 80, 77 S. Ct. 101 (1956), and *Merchandise Warehouse Company v. ABC Freight Forwarding Corp.*, 165 Fed. Supp. 67 (S. D. Ind., 1958), both antedate *T.I.M.E.*, and to the extent that they conflict with it must be deemed to have been overruled. Moreover, the existence of a statutory remedy cognizable in the federal courts absent diversity of citizenship was not considered in either of these cases. In *Meier & Pohlman Furniture Co.*, it does not appear that the jurisdiction of the court was questioned, and the formal finding of jurisdiction is supported by no citation of authority. In *Merchandise Warehouse Company*, the District Court dealt directly with the merits of the case after noting that objections to jurisdiction had been defectively presented.

(b) Next, petitioner contends that the court below misapplied decisions of this court [Pet. pp. 15-17]. Petitioner's first contention in this regard is that the existence of a statutory as well as a common law remedy may be predicated upon the holding in *Hewitt-Robins;* Its second contention comprises a statement of the claimed anomalous consequences of the decisions in *T.I.M.E.* and in *Hewitt-Robins*, taken together.

Petitioner's argument based upon *Hewitt-Robins*, urged in various forms throughout its petition, is, in substance, that since that decision postulates the survival of common-law rights in certain factual situations involving Motor Carriers, the provisions of the Motor Carrier Act applicable to those situations must be read to create statutory causes of action as well. There is nothing to this effect in *Hewitt-Robins*. Rather, as the court below pointed out in response to this

same contention, *Hewitt-Robins* considered only the survival of the common-law right there involved. No other matters were before the Court for decision. Petitioner's argument as to the "teaching" of *Hewitt-Robins* seemingly assumes that in that case, the square holding in Part I of T.I.M.E. was overruled, on a matter not even before the Court, and neither necessary nor appropriate to its decision. This assumption is plainly unwarranted.

There is no inconsistency between the existence of a common law remedy and the absence of a statutory federal remedy. The claimed anomaly, as petitioner itself notes, arises out of the holding of the Court below that a common law remedy survived but may have "been affected or qualified or supplemented by the Motor Carrier Act" (323 F. 2d at 771). Any such effect, qualification or supplementation could arise only out of an inconsistency between the common law action and the Motor Carrier Act, in the face of the clear Congressional intent that inconsistent common law remedies be abrogated [Motor Carrier Act, Section 216(j), 49 U. S. C. §316(j)].

The inconsistency would not be cured by the existence of a statutory remedy unless the common law remedy and the statutory remedy were consistent without any change in the common law remedy dictated by the statutory remedy. *T.I.M.E.* holds that no statutory remedy exists, and *Hewitt-Robins* in no way affects that holding. Inquiry, therefore, must be directed at the underlying assumption that a common law remedy has survived [Point II, *infra*].

II.

Having Decided in T.I.M.E. That No Statutory Civil Remedy Has Been Created, This Court Should Grant Certiorari in This Case, Not to Review That Question, But to Review the Question of the Survival of a Common Law Remedy and the Other Questions Presented by the Petition of the Other Carriers.

Shipper and the Other Carriers agree that the case presents several important questions of federal law for review upon certiorari which have not been, but should be settled by this Court. These Respondents concur in this view, even though, by virtue of the correct holding of the court below that no statutory remedy exists, the dismissal of the case as to these respondents would not be affected by the determination of these questions. These respondents operate in numerous states, and, like all other carriers operating in more than one state, are vitally interested in the resolution of these issues.

We agree that the questions presented for review are those set forth by the Other Carriers in their petition (see Questions Presented, *supra*) and not those formulated by Shipper in its reply to that petition and in the petition herein.

Shipper expressly agrees that questions 3 and 5 should be reviewed by this court [Rep. pp. 5-6].

The question whether jurisdiction of the District Court is pre-empted by the National Labor Relations Board (question 4) has been answered affirmatively in *per curiam* decisions of this court in cases brought under common law—the only cause of action upheld by the court below in this proceeding. Shipper contends that

these *per curiam* decisions do not lead to that result, and that therefore the contrary holding in the Court of Appeals is correct [Rep. pp. 5, 8-10; see Pet. pp. 20-21]. Be that as it may, it is obvious that all parties agree this vital issue requires resolution by this court [O. C. Pet. 17-23].

As to the issue whether a common-law cause of action survived the adoption of the Motor Carrier Act (question No. 1), Shipper has taken inherently inconsistent positions. In its reply to the petition of the Other Carriers [Rep. pp. 6-8], Shipper contends that the decision of the Court of Appeals in this regard is perfectly consistent with the decisions of this court and that review is therefore unnecessary. In the instant petition, however, Shipper recognizes the far-reaching and anomalous consequences of that holding, none of which, as it concedes, have been passed upon by this court. The anomaly which petitioner perceives does not, as we have shown above, call into question the absence of any statutory remedy, but it does cast serious doubt upon the survival of the common-law remedy. At the very least, it may be said that this court did not decide either in *T.I.M.E.* or in *Hewitt-Robins* that common-law remedies can be saved from extinction by reason of inconsistency with the statutory scheme by virtue of being affected, modified or qualified by the Motor Carrier Act. On the contrary, *T.I.M.E.* did decide that a common-law remedy inconsistent with the statutory scheme did not survive, and in *Hewitt-Robins* the common law remedy was held to have survived because it was consistent with the statutory scheme. In holding that the common-law remedy survived without deciding whether or not it was consistent

with the statutory scheme, the Court of Appeals decided this question in a manner which is in conflict with the decisions in *T.I.M.E.* and in *Hewitt-Robins*.

Conclusion.

For the reasons hereinabove set forth, this Court should refuse to review the questions presented by Shipper in this petition and should grant certiorari to review the questions presented in the petition of the Other Carriers.

Respectfully Submitted,

HARRY J. KEATON,
Attorney for Respondents Pacific Intermountain Express, a Corporation, and Consolidated Frightways, a Corporation.

LOEB and LOEB,
ROBERT A. HOLTZMAN,
Of Counsel.

APPENDIX A.

Labor Management Relations Act.

(49 U. S. C. §§157, 158)

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *PROVIDED*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *PROVIDED*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *PROVIDED FURTHER*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *PROVIDED*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or

in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an

order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results

thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *PROVIDED,* That where there is in effect a collective-

bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of

section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection and subsection (b)-(4)-(B) of this section the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufac-

turer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified appli-

cants for such employment, or (4) shall agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry of in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.